

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH LEWIS FLOWERS,

Defendant-Appellant.

UNPUBLISHED

October 21, 2003

No. 243907

Chippewa Circuit Court

LC No. 01-007252-FH

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant appeals by right his conviction after a jury trial of one count of delivery of a controlled substance. MCL 333.7401(2)(a)(iv). The trial court sentenced defendant as a habitual fourth offender (MCL 769.12) to 3 to 30 years in prison. We affirm.

I. Facts

This case arises from the March 26, 2001¹, sale of oxycodone pills by defendant to undercover police officers. Sault Ste. Marie police officer John Weist testified that through the use of an informant, George Murray, he arranged a controlled buy as part of SANE's (The Straits Area Narcotics Enforcement team) ongoing enforcement of narcotics trafficking in the area.

Weist testified that Murray provided him with the names of several people who he knew were dealing prescription pills. One of the names given was defendant's. Weist testified that Murray arranged to purchase three, 80 milligram, oxycodone tablets from defendant for \$45 a piece. As part of the controlled buy, Murray and his vehicle were searched for unauthorized money or drugs prior to his meeting with defendant. After finding no unauthorized drugs or money on Murray, he was given the SANE funds, \$135, that were to be used to purchase the pills. Weist testified that Murray then contacted defendant to arrange where they would meet. They arranged to meet at an Auto Value store.

¹ Defendant was originally charged with three counts of delivery of a controlled substance stemming from sales of oxycodone pills to a police informant on March 26, 2001, April 20, 2001, and July 23, 2001. He was convicted only for the March 26, 2001 sale.

At the meeting, Murray and defendant were also being observed by two other SANE officers. Weist testified that he observed Murray meet with defendant, get into defendant's vehicle and later exit the vehicle. Murray left defendant to meet with Weist. Murray gave Weist three pills of oxycodone that he had purchased from defendant. Defendant was charged with three counts of delivery of a controlled substance, each count stemming from separate transactions. The jury found defendant guilty of one count of delivery of a controlled substance.

II. Standards Of Review

Generally, a claim of prosecutorial misconduct is a constitutional issue which is reviewed de novo, but the trial court's factual findings are reviewed for clear error. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, a defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

III. Analysis

A. Prosecutorial Conduct and the Physician-Patient Privilege

Defendant argues that the prosecutor both engaged in reversible misconduct and violated the physician patient privilege by asking about defendant's medications and who administered them. We disagree.

During cross-examination of defendant at trial, the prosecutor elicited that defendant had a prescription for Oxycodone. Defense counsel objected on the basis of physician-patient privilege. The prosecutor further elicited that the Oxycodone was being administered to defendant by a physician. The prosecutor then asked who was administering the oxycodone. Defense counsel again objected on physician-patient privilege. Defendant also asserts that the prosecutor argued to the jury that the defendant was lying because of his evasiveness about his use of medications.

Defendant cites *People v Paasche*, 207 Mich App 698, 709; 525 NW2d 914 (1994) for the proposition that there is an adverse inference of guilt that may be drawn against a defendant by the jury from the claim of a testimonial privilege. In *Paasche*, defendant asserted attorney-client and accountant-client privileges. In this case, it is a physician-patient privilege that was allegedly violated.

In *Paasche*, both the trial judge and the prosecutor knew that the witness would invoke the attorney-client privilege because defense counsel raised the issue before trial. Here, there is no indication or suggestion from the trial transcript that this issue was raised before trial. Nor is there any indication from the transcript that the prosecutor, or the trial judge, knew that defendant would invoke a physician-patient privilege. Thus, the facts of this case are distinguishable and any "adverse inference" is not substantial enough to warrant reversal.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted). *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in

context to determine whether the defendant received a fair and impartial trial. *Id* at 586. When the court is confronted with a potential witness who is intimately connected with the criminal episode at issue, protective measures must be taken. *People v Poma*, 96 Mich App 726, 732; 294 NW2d 221 (1980). The court should first hold a hearing outside the jury's presence to determine if the intimate witness has a legitimate privilege. *Id.* at 732. This determination should be prefaced by an adequate explanation of the self-incrimination privilege so the witness can make a knowledgeable choice regarding assertion. *Id.* at 732.

Defendant argues that it was "predictable" that defendant would assert the doctor-patient privilege about his prior medical treatment to maintain his privacy. Defense counsel argues that the prosecutor did not use the proper procedure for resolving the issue out of the jury's presence as established in *Poma*, *supra*. However, in reviewing the record there is no indication of the predictability of defendant asserting the privilege to maintain his privacy. Nor has defense counsel presented any evidence that the privilege asserted was predictable. Absent defense counsel's contention, there is nothing to suggest that the prosecutor knew or should have known that the defendant would assert the privilege.

Defense counsel further argued that the prosecutor capitalized on the assertion of the privilege to argue to the jury that defendant was lying. This argument is without merit. In reviewing the specifically referenced portion of the transcript which defense counsel points to, the prosecutor does not argue to the jury that defendant was lying, but rather, asks whether the defendant was, "telling the truth."

Prosecutor's conduct does not appear to have been prejudicial. Nor does review of case law substantiate defendant's arguments. Absent defendant's assertions which were previously addressed, there is no evidence that defendant was denied a fair and impartial trial. Thus, there was no prosecutorial misconduct warranting a new trial.

B. Informant Credibility

Defendant next argues that the prosecutor vouched for the informant and bolstered his credibility. Defendant asserts that during trial, the prosecutor elicited from Officer Weist that Murray had purchased narcotics from six other people and Murray indicated that he purchased drugs from five or six others. Defendant further argues that in closing argument, the prosecutor emphasized Murray's value to the community and indirectly, bolstered his credibility by implying that because he was correct in identifying seven drug dealers, he must be correct about defendant. Defendant argues that there was no evidence that the other individuals had been found guilty of drug delivery or evidence to corroborate the assertions made by them.

Defendant failed to object to these statements at trial. To preserve most issues, a party must object below. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). However, a criminal defendant may obtain relief based upon an unpreserved claim of prosecutorial misconduct if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *Schutte*, *supra*.

A prosecutor may not vouch for the credibility of a witness by placing the prestige of the prosecution or police behind that witness, nor may she bolster credibility by suggesting evidence

of guilt that lies beyond the record. *United States v Martinez*, 253 F3d 251, 253-254 (CA 6, 2001). Defendant's contention that the prosecutor in this case vouched for the credibility of the witness is not reflected in the record.

Defendant's argument that there was no evidence that the individuals had been found guilty of drug delivery or that no evidence was presented to corroborate the assertion of "guilt" of the individuals is misplaced. At no point in the record does the prosecutor allege that the individuals referred to had been found guilty of drug delivery. However, the record does indicate, as acknowledged in defendant's brief, that previous testimony had been elicited from Weist that Murray assisted the SANE team in making purchases. In fact, Weist named seven different individuals, first and last names, to substantiate this fact.

Nothing in the prosecutor's statement indicated that she believed the prosecution witnesses testified truthfully or that the stories of specific witnesses were verified. Finally, any impermissible inference flowing from his testimony did not amount to error requiring reversal *People v Bahoda*, 448 Mich 261, 282, 531 NW2d 659 (1995)

C. Intentional Misrepresentation

Defendant argues that the prosecutor improperly accused defendant's attorney of deceiving the jury. We disagree.

Specifically, defendant objects to the following comment made by the prosecutor:

And what the defense has attempted to do in closing argument is blow up a smokescreen, throw enough things out so you won't be able to see his guilt. Where there is smoke there is fire. The smokescreen that he blew up was memory, Mr. Murray's memory. Mr. Murray wasn't able to remember things and all I can say is, come on, it was a year, almost a year and a half ago.

Defendant failed to object to these statements at trial and we therefore review this issue for plain error affecting substantial rights. *Schutte, supra*.

A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). However, in this case the comments of the prosecutor do not suggest that defense counsel is intentionally trying to mislead the jury. Instead, the comments indicate that the prosecutor herself is skeptical of the alternate theories presented by defense counsel. Thus, the prosecutor's comments did not constitute error.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Bill Schuette